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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 2 Misc.

STEPHEN S. CHANDLER,
United States District Judge for the
Western District of Oklahoma
Petitioner,

vs.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
Respondent.

On Motion for Leave to File a Petition for Writ of Prohibition and/or Mandamus

---

BRIEF FOR THE RESPONDENT

CHARLES ALAN WRIGHT
Attorney for the Respondent
2500 Red River Street
Austin, Texas 78705

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BRIEF FOR THE RESPONDENT

Opinions Below

There are no opinions below, nor is there a record as such, in this case. Most of the relevant documents are contained in the Statement and Report of the Judicial Council of the Tenth Circuit (cited hereafter as "Statement"), filed with this Court in September, 1969.

Jurisdiction

Petitioner claims that this Court has jurisdiction under 28 U.S.C. § 1651(a). Respondent does not believe that this Court has jurisdiction and has briefed the jurisdictional issue as a distinct question presented.

Questions Presented

1. Whether this Court has constitutional jurisdiction and statutory authority to entertain, in the first instance, an application for an extraordinary writ to review the determinations of a circuit judicial council?

2. Whether the determinations made by the Judicial Council of the Tenth Circuit regarding the judicial business to be assigned to petitioner as a district judge were authorized by statute and consistent with the Constitution?

Statutes Involved

The relevant statutes are set forth at pages 3-4 of the Brief of the Solicitor General as amicus curiae.

Statement

The case is correctly stated at pages 4-12 of the Brief of the Solicitor General. It may help the Court, however, for us to set forth here a chronology of the events in this case.

December 13, 1965 — the Judicial Council ordered that until further order Judge Chandler was to take no action in any case pending before him and that no new cases were to be assigned to him. (Statement 1-5). This order was filed December 27, 1965.

January 6, 1966 — Judge Chandler filed with this Court his motion for leave to file a petition for an extraordinary writ directed to the Judicial Council, and also asked this Court to stay the order of the Judicial Council. (Motion for Leave to File.)

January 13, 1966 — Solicitor General Marshall, on behalf of the Judicial Council, filed with this Court opposition to the request for a stay, accompanied by a statement of the Judicial Council emphasizing the temporary nature of the December 13th order and the willingness of the Judicial Council to give Judge Chandler a prompt hearing. (Memorandum for the Respondent in Opposition to the Application for Stay.)

January 21, 1966 — this Court denied the stay application. 382 U.S. 1003 (1966).

January 25, 1966 — the judges of the Western District of Oklahoma advised the Judicial Council that they had agreed on the division of new business filed in that court but that they could not agree on the assignment to other judges of cases then pending before Judge Chandler. (Statement 6-13.)

January 27, 1966 — the Judicial Council set a hearing for February 10th with regard to Judge Chandler. (Statement 14-16.)

February 4, 1966 — the Judicial Council, having been advised that no judge of the Western District wished to be heard by it (Statement 17-20), cancelled the hearing set for February 10th. The Judicial Council, acting under 28 U.S.C. §§ 137 and 332, ordered that new cases in the Western

District were to be divided as provided in the agreement of the judges on January 25th. It resolved the disagreement of the judges about cases already pending by ordering that cases assigned to Judge Chandler as of December 28, 1965, should remain assigned to him. (Statement 21-31.) The Judicial Council further provided that "this order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966," and it authorized the judges of the Western District to amend or modify the division of business provided in this order. (Statement 27.)

March 22, 1967 — on the basis of information provided by the Administrative Office, the Judicial Council concluded that no present action was indicated relative to the assignment of judges in the Western District. (Statement 34.)

July 12, 1967 — the Judicial Council, noting that only 12 cases remained pending before Judge Chandler, requested the judges of the Western District to agree on a rule or order for the division of business among them. (Statement 56-60).

September 1, 1967 — the judges of the Western District including Judge Chandler, advised the Judicial Council that "the current order for the division of business in this district is agreeable under the circumstances." (Statement 61.)

September 14, 1967 — the Judicial Council concluded that in view of the letter of September 1st from the judges "no action of the Council is either necessary or appropriate at this time." (Statement 62-64.)

June 4, 1969 -- Judge Chandler filed a motion in this Court to advance this case on the docket.

June 16, 1969 — this Court denied the motion to advance but set oral argument for October 20, 1969. 395 U.S. 956 (1969).

September 5, 1969 — Judge Chandler (Brief of Petitioner and Waiver of Oral Argument) and the Judicial Council (Statement 66) advised the Court that they wished to waive oral argument of the case.

October 13, 1969 — this Court removed the case from the current argument list and "ordered that briefs and oral arguments be presented by counsel for the parties." 396 U.S. — (1969).

Summary of Argument

I.

If this proceeding invokes the appellate jurisdiction of the Court, the All Writs Act, 28 U.S.C. § 1651(a), apparently provides statutory authority for the Court to act, though the matter is not free from doubt. But this proceeding is appellate in nature only if the action challenged was judicial action by a lower court. The action of the Judicial Council was administrative, not judicial, in nature and the Judicial Council is not a court. Accordingly this proceeding is an impermissible attempt to invoke the original jurisdiction of this Court in a case not within the constitutional allocation of original jurisdiction.

II.

There is no occasion now to determine whether the

order of December 13, 1965, was vulnerable whether on substantive or on procedural grounds. The order has long since been superseded.

The order now in effect, permitting Judge Chandler to dispose of cases pending before him on December 28, 1965, but barring the assignment of new cases to him, is in accord with his view as to the proper division of business in his district and cannot be complained of by him. Even if Judge Chandler had not acquiesced in this division of business, the Judicial Council is authorized by sections 137 and 332 of the Judicial Code to require this division.

The legislative history of the statute creating judicial councils, and the subsequent understanding of that statute by those concerned with it, show that Congress intended to give to the judicial councils all administrative powers necessary to maintain efficiency in the courts of the United States and public confidence in the administration of justice.

Argument

I. This Court Does Not Have Jurisdiction Of This Proceeding.

It is with the utmost reluctance that respondent feels bound to challenge the jurisdiction of this Court in this case. The Judicial Council, no less than Judge Chandler, is desirous of a prompt and authoritative answer to the question whether it is acting within the power granted it by Congress. But the issue of jurisdiction is, as the Solicitor General says, "far from clear" (Sol.Gen.Br. 14), and counsel for respondent would be derelict in his duty to this Court if he did not bring to the attention of the Court the considera-

tions that have persuaded him that jurisdiction does not exist.[1]

In dissenting from the denial of a stay of the Judicial Council's order of December 13, 1965, Justices Black and Douglas characterized the Judicial Council as a "governmental agency" entrusted only with "limited *administrative powers.*" 382 U.S. 1003, 1005 (1966). The Solicitor General has taken note of those statements and says:

> If that characterization is accurate, this Court has no jurisdiction under the Constitution to pass upon Judge Chandler's petition. No further authority would be needed to sustain this conclusion than *Marbury* v. *Madison,* 1 Cranch 137.

(Sol.Gen.Br. 15.) The Solicitor General is of course quite right. No authority other than *Marbury* is needed for the proposition, but other authority exists. Numerous cases support the proposition that the authority of this Court to issue writs of prohibition or mandamus "can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction." *Ex parte Peru,* 318 U.S. 578, 582 (1943). See also *Ex parte Barry,* 2 How. 65 (1844); *United States* v. *Ferreira,* 13 How. 40 (1851).

The Solicitor General is equally correct when he says that the key question is

> whether a judicial council is, for these purposes,

[1]When counsel was asked by the Judicial Council to act as its attorney, he was told: "It is the Council's desire that you should have a completely free hand in your consideration and resentation of this matter." No member of the Judicial Council has seen this brief prior to its filing. No member of the Judicial Council has made any suggestion about what it should or should not contain.

> a "lower court" or "inferior tribunal" whose decisions are reviewable in the exercise of this Court's appellate jurisdiction, rather than an administrative agency whose personnel happen also to serve as circuit judges.

(Sol.Gen.Br. 17.) Respondent parts company with the Solicitor General when he concludes, in response to that question, that "at least insofar as a Council is acting to direct the conduct of judicial business by district judges, it is functioning both in form and in substance as a judicial tribunal * * *." (Sol.Gen.Br. 17.) Respondent believes that Justices Black and Douglas were wholly right in their characterization of judicial councils, that these councils are agencies whose powers are entirely administrative, and that they have always been so regarded.

In 1961 a special committee of the Judicial Conference of the United States, of which Chief Judge Johnsen of the Eighth Circuit was chairman, reported to the Conference on the proper role of judicial councils. This report was approved by the Judicial Conference with only one dissenting vote — see *Hearings on the Judicial Reform Act, S. 3055, etc., before the Senate Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary,* 90th Cong., 2d Sess. (1968), p. 70—and transmitted to the Congress by Chief Justice Warren. *Report on the Powers and Responsibilities of the Judicial Councils.* H. Doc. No. 201, 87th Cong., 1st Sess. (1961) (cited hereafter as *Report*). That report is such a comprehensive study of the background of judicial councils, of the legislative history of the 1939 statute that brought them into being, and of the present understanding of their proper function that its full text has been reproduced, as a convenience for

the Court, as an Appendix to this Brief. That report makes it very clear that judicial councils were created as a part of a "correlated scheme being enacted, for 'The Administration of the United States Courts.'" *Report* 4. The judicial councils were "an instrument of intended importance in the administration of the Federal court system * * *." *Report* 7.

The administrative nature of the powers of the judicial councils was no latter-day perception. The report of the House Judiciary Committee on the 1939 legislation said, with particular reference to the provision for judicial councils, that it was intended "to furnish to the Federal courts the administrative machinery for self-improvement * * *." H. Rep. No. 702, 76th Cong., 1st Sess. (1939), p. 2. When the legislation came before the Senate Judiciary Committee, the late Alexander Holtzoff, who, as Special Assistant to the Attorney General, was active in pressing for enactment of it, testified as follows:

> There is a mandatory clause in the bill requiring the district judges to accept and follow the directions of the judicial council. To this extent they are responsible for the administrative side of the Federal judiciary and for dispatching the work of the courts in a business-like manner and expediting the decision of cases.

Hearings on Administration of United States Courts before a Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess. (1939), p. 36.

When the 1961 report of the Judicial Conference Committee was published as a House Document, Representative Celler prepared a Foreword to it. In it he said that it was important and urgent "that the judicial councils in all circuits discharge their broad

administrative functions as contemplated and authorized by the Congress." *Report* v. Again he said:

> Since I, at the time, was a member of the Committee in the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice.

Report v. Finally he said that "by placing responsibility and authority in the councils of the circuits, administrative power in the judicial branch was decentralized, as it ought to be, and in each circuit kept in the hands of judges of the circuit." *Report* vi.

This understanding that the power of a judicial council is administrative, not judicial, is shared by scholars. See Comment, *Removal of Federal Judges — New Alternatives to an Old Problem,* 13 UCLA L. Rev. 1385, 1406 (1966); cf. Currie, *Federal Courts: Cases and Materials* 231 (1968). Indeed from a thorough study of the literature it appears that it has never been suggested, prior to the filing of the Solicitor General's Brief, that a judicial council is a judicial tribunal or that the actions it takes are in any sense judicial rather than administrative.

An examination of the statutes giving powers to judicial councils fully supports this understanding about the nature of their function. The most important of these, of course, is 28 U.S.C. § 332, creating these agencies, and providing:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its

> circuit. The district judges shall promptly carry into effect all orders of the judicial council.

In addition to this general provision there are many other statutes vesting particular functions in judicial councils. A judicial council may tell a district judge where he is to make his abode. 28 U.S.C. § 134(c). It may make necessary orders if the district judges in any district are unable to agree upon the division of business among them. 28 U.S.C. § 137. The judicial council must consent to the pretermission of any regular session of a district court. 28 U.S.C. § 140(a). Court quarters and accommodations can be provided by the Administrator of General Services only if they have been approved as necessary by the judicial council. 28 U.S.C. § 142. No designation and assignment of a circuit or district judge in active service to sit elsewhere can be made without the consent of either the chief judge of the circuit or the judicial council. 28 U.S.C. § 295. The judicial council may certify to the President that a circuit or district judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability, and, if the President agrees, an additional judge can then be appointed. 28 U.S.C. § 372(b). The judicial council may direct where the records of district courts and of the court of appeals are to be kept. 28 U.S.C. § 457. The judicial council must approve every plan for furnishing representation for defendants under the Criminal Justice Act. 18 U.S.C. § 3006A(a). Finally the judicial council has a variety of powers with regard to referees in bankruptcy, 11 U.S.C. §§ 62(b), 65(a), (b), 68(a), (b), (c), 71(b), (c), including the power to remove for cause a referee. 11 U.S.C. § 62(b).

The Solicitor General argues that a judicial council

is a judicial tribunal "at least insofar as a Council is acting to direct the conduct of judicial business by district judges." A great many of the powers just listed involve the direction of the conduct of judicial business at least as much as do the orders of the Tenth Circuit Judicial Council. We can properly dismiss as an imaginary horrible any suggestion that to hold that a judicial council is a judicial tribunal would swamp this Court with applications like this one directed at a multitude of orders by judicial councils. It is less easy to dismiss the impression that all of these powers are administrative in nature and not susceptible of a judicial determination.

This Court has been consistently faithful to the rule Justice Story suggested long ago:

> In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies, that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate judisdiction may be exercised in a variety of forms, and indeed in any form in which the legislature may choose to prescribe; but, still, the substance must exist, before the form can be applied to it. To operate at all, then, under the constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity.

2 Story, *Commentaries on the Constitution of the United States* § 1761 (3d ed. 1858). The usual conclusion of the Court has been that whether the body whose decision it is sought to have reviewed was a "court" or whether its authority was "judicial" de-

pends on whether its proceedings followed the customary forms of the law, instituted and conducted throughout according to the regular course of judicial procedure. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup.Ct.Rev. 153, 166-167. See also *Tutun* v. *United States,* 270 U.S. 568, 576-577 (1927).

The Solicitor General suggests that "a judicial council is no more and no less than the court of appeals for the particular circuit sitting *en banc.*" (Sol.Gen. Br. 18.) It is true that the statutory definition of a judicial council, 28 U.S.C. § 332, and the statutory definition of a court of appeals en banc, 28 U.S.C. § 46(c), are the same. This need not always be the case. From the inception of the idea of judicial councils to the present there has been considerable sentiment for including some district judges on the judicial council. *Hearings on the Judicial Reform Act, S. 3055, etc., before the Senate Subcommittee on Improvements in Judicial Machinery, Committee on Judiciary,* 90th Cong., 2d Sess. (1968), pp. 33. 60-79. Presumably this would make no difference since the judicial council, however constituted, certainly has many powers that would not be "cases" or "controversies" within the meaning of Article III, § 2, and if the judicial council can be regarded as a " court" in any sense it must be as a non-Article III court. That in itself would not bar review here.

But the fact that an act is done by a judge or by a court does not mean that the act is a judicial one or that it is within the appellate jurisdiction of this

Court.[2] *United States v. Ferreira,* 13 How. 40 (1851), was an attempt to review the determination of a district judge in which, as authorized by statute, he passed on certain claims under a treaty and then transmitted his recommendation to the Secretary of the Treasury for final approval. The Court, speaking through Chief Justice Taney, held that the award by the judge was not reviewable.

> It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner.

13 How. at 47. See also *Hayburn's Case,* 2 Dall. 409 (1792); *Gordon* v. *United States,* 2 Wall. 561 (1865).

The case of *In re Metzger,* 6 How. 176 (1847), grew out of a treaty between the United States and France providing that this country would, on demand, extradite persons accused in France of certain crimes. The treaty further provided that this should be done only when the fact of the commission of the crime was sufficiently established that, if the crime had been committed here, there would be probable cause for

[2]Counsel for respondent and his wife were married by the late Judge Charles E. Clark, acting under the authority of a Connecticut statute. Surely in performi .g that ceremony Judge Clark was not deciding a case or controversy within Article III, § 2, and his action would not be subject to appellate review.

arrest and commitment for trial. When extradition of Metzger was demanded, the executive branch referred it to the judgment of a judicial officer. A district judge held a hearing in chambers and determined that there was good ground for extradition of Metzger. It ordered him apprehended and committed to be delivered up to the French authorities. He sought habeas corpus in this Court, but the Court held it was without jurisdiction.

> There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provvision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding and this has not been given by Congress, if they have the power to confer it.

5 How. at 191-192.

The courts of appeals are created by 28 U.S.C. § 43(a). The judicial councils are created by 28 U.S.C. § 332. That their personnel are the same is not a happenstance. As the Solicitor General very properly points out, Congress deliberately intended to give administrative power over the courts to an instrumentality within the judicial branch. (Sol.Gen.Br. 18-20). But this does not make the council a court nor does it make its function judicial. The familiar language of Justice Holmes in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908), points the way to decision.

> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken

> place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. * * * Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. * * * That question depends not upon the character of the body, but upon the character of the proceedings.

Of the many powers conferred on judicial councils, listed earlier, there is only one — the power to remove for cause referees in bankruptcy — that "investigates, declares, and enforces liabilities as they stand on present or past facts" and that can properly be regarded as judicial. The Solicitor General detects an analogy between the orders involved in this proceeding and a disbarment proceeding. (Sol.Gen.Br. 20-21.) But disbarment, like removal of a referee, looks to the past. It has consequences in the future, but so too does a criminal conviction, and a criminal trial is surely "judicial" in nature.

Each of the powers of a judicial council "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." These powers are legislative, or administrative, in nature. The judicial

council may well look to the past to decide what the rule for the future should be. "Most legislation is preceded by hearings and investigation." 211 U.S. at 227. When a judicial council tells a district judge that he is to dispose of his pending cases before taking on new ones, or that he is to live at a particular place in the district, or that he may pretermit a regular session of his court, it is announcing the rule that is to be followed from that point on. The judicial council is wholly powerless to punish a district judge for past acts of which it disapproves. It has full power to tell a district judge what he must do in the future and it is then the duty of the district judge to "promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332.

An order of a judicial council is very much like an order of a court of appeals reviewing a determination by the Commissioner of Patents. It "is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution." *Postum Cereal Co., Inc.* v. *California Fig Nut Co.*, 272 U.S. 693, 698-699 (1927).

In *United States* v. *First City Nat. Bank of Houston*, 386 U.S. 361, 369-370 (1967), this Court was able to find that the role assigned to the courts by the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), was a "judicial" one. It noted that "the courts are not left at large as planning agencies." The standards to be applied were familiar ones and well within "the area of

judicial competence." But the judicial councils are left at large as planning agencies. There are no familiar standards to be applied. The decisions judicial councils must make are administrative decisions wholly outside the area of judicial competence.

It may be objected that Judge Chandler will be without a remedy if this Court must dismiss the present petition as an impermissible attempt to invoke its original jurisdiction. As the Solicitor General points out, "necessity cannot create jurisdiction." (Sol.Gen. Br. 28.) In the *Postum Cereal* case it was argued that refusal of review in the Supreme Court, on the ground that the action below was administrative rather than judicial in character, would leave the appellant without any remedy. Chief Justice Taft replied: "Even if this be so, as to which we express no opinion, it cannot furnish a reason for exceeding the constitutional powers of this court." 272 U.S. at 701. See also *Ex parte Peru,* 318 U.S. 578, 583 n. 3 (1943).

In *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803), Chief Justice Marshall assured Marbury that the law of the land provided him a remedy — but he neglected to specify what it might be. The portion of section 13 of the First Judiciary Act authorizing writs of mandamus to persons holding office under the authority of the United States was expressly limited to the Supreme Court. It would have required considerable prescience on Marbury's part to look 35 years into the future and realize that the Circuit Court of the District of Columbia had inherited from Maryland the common law power to issue mandamus. See *Kendall* v. *United States* ex rel. *Stokes,* 12 Pet. 524 (1838).

In truth it is unlikely that Judge Chandler will be

without remedy if this action is dismissed. If, as we have argued, a judicial council is an agency exercising administrative powers, relief in the district court would seem to be available under 28 U.S.C. § 1361. The members of the Judicial Council could not sit on an appeal, 28 U.S.C. § 455, but this is not an insuperable objection. Judges from elsewhere could be designated to serve as the court of appeals, 28 U.S.C. § 291(a), or this Court could grant certiorari prior to decision by the court of appeals. 28 U.S.C. § 1254(1). For reasons set forth in the next portion of this Brief, it seems clear that Judge Chandler is not entitled to any relief, but if we are wrong about this, he has a remedy that does not violate the constitutional limits on the jurisdiction of this Court.

Our argument in this section has been addressed solely to the constitutional barriers to jurisdiction. For substantially the reasons advanced by the Solicitor General (Sol.Gen.Br. 21-31), we agree, though not without considerable doubt, that if this proceeding is within the appellate jurisdiction of this Court, the All Writs Act, 28 U.S.C. § 1651(a), provides statutory authority for the exercise of that jurisdiction. But in our view, this is not within the appellate jurisdiction and the Constitution precludes this Court from hearing the case within its original jurisdiction.

II. The Orders Of The Judicial Council Now In Effect Are Valid.

In this portion of the Brief we agree with the Solicitor General (Sol.Gen.Br. 31-51) that in the present posture of the case petitioner is not entitled to any relief. Our reasons for this conclusion are substantially those put forward by the Solicitor General and, in-

sofar as possible, we will not repeat what he has said.

There is no occasion now to defend the substance of the order of December 13, 1965, or the procedure by which it was adopted. That order was expressly superseded by the order of February 4, 1966. (Statement 27.) But the briefs filed by Judge Chandler, by his counsel, and by Mr. Shipley employ vigorous rhetoric in their attack on the Judicial Council. The Judicial Council is accused of "unbridled usurpation and abuse of judicial power flagrantly violative of all American precepts of judicial ethics and propriety" (Shipley Br. 5), of "the most shocking un-American proceeding ever conducted by members of the Federal judiciary" (Chandler pro se Brief 3), and of many other equally unattractive things.

Because of the warmth of the attack, a word of defense is justified. It may well be, as the Solicitor General argues, that "no tribunal can be allowed by summary, *ex parte* procedures to assert non-feasance or misfeasance and to strip a federal judge of the incidents of his office." (Sol.Gen.Br. 37.) But the order of December 13th expressly provided that it was to be effective "until the further order of the Judicial Council." (Statement 3.) The Judicial Council, through its distinguished former counsel, informed this Court that it was intended that the December 13th order would be "temporary only, pending prompt further proceedings inquiring into the administration by Judge Chandler of judicial business in the Western District of Oklahoma. * * * The order of December 13 was issued because, in the view of the Judicial Council, Judge Chandler should not discharge the duties of his office during the period while the conduct of his office was thus in question." (Memorandum for the

Respondent in Opposition to the Application for Stay 2-3.) Solicitor General Marshall further told the Court that "public confidence in the federal judiciary would inevitably be impaired if Judge Chandler were to preside over the District Court for the Western District while the question of his present fitness to serve in that capacity is under consideration." (Id. at 3.) Reasonable men could well support this position. To act first and hear later is a "drastic procedure" and imposes "a heavy responsibility to be exercised with disinterestedness and restraint." *Kennedy* v. *Mallonee*, 332 U.S. 245, 253-254 (1947). But there are circumstances under which the power exists. Even assuming arguendo that the present Solicitor General is right, and that the power did not exist in this instance, an honest mistake about the propriety of the procedure followed by the Judicial Council does not warrant the harsh language in which its action is now being described.

In the first of his two briefs amicus, Mr. Shipley makes the point that "no evidence dehors the record may be considered. The order itself and the admissions of Respondent made in this action constitute the entire record." (Amicus Br. 3.) This seems entirely right. It is on just this premise that counsel for respondent has confined his preparation entirely to the documents on file in this Court and has not discussed with any member of the Judicial Council the background that led to the Council's action. The suggestions in the briefs of the petitioner and of Mr. Shipley of improper motivation on the part of the members of the Judicial Council seem inconsistent with this salutary principle.[3]

[3]So too does the suggestion of Mr. Shipley in his more

Nor is it apparent that as a matter of substance the temporary order of December 13, 1965, was beyond the power of a Judicial Council. Certainly there must be some circumstances in which it would be proper to order a judge to take no judicial action whatever for the time being. Suppose, for example, that a federal judge were indicted for income tax evasion. Presumably he would refuse to sit until his case was tried and he was either convicted or vindicated. But if he should fail to do so, and were to continue sitting, the judicial council would be derelict if it did not order him not to sit during the pendency of his own case. Judicial councils are charged with taking any action needed for "the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system * * *." *Report* 9. The hypothetical example is not this case — but if, as the example suggests, the power exists, the question of when it should be exercised becomes one of wise judgment.

Even if it be assumed that the order of December 13th was invalid, it can hardly be of interest to this Court now. It was in effect for 55 days. It has been expressly superseded for nearly three years. Surely this case poses no occasion for this Court to investigate the problems of the meaning of "good Behavior" or whether impeachment is the only constitutionally permissible means to remove federal judges. These are a

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recent brief (Motion for Leave to File Brief and Brief of Amicus Curiae 10-12) that this Court should judicially notice "a confidential House Committee Print" from which he quotes extensively. Counsel for respondent has never seen the document nor, so far as he knows, has the Judicial Council. The notion of this Court judicially noticing confidential documents of another branch of government is not an attractive one.

fascinating subject for scholarly speculation. E.g., Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History,* 36 U.Chi.L.Rev. 665 (1969); Stolz, *Disciplining Federal Judges,* 57 Calif.L.Rev. 659 (1969); Shartel, *Federal Judges — Appointment, Supervision, and Removal — Some Possibilities Under the Constitution,* 28 Mich.L.Rev. 485, 723, 870 (1930). They are not ripe for decision in the present case.

There is a curious suggestion in the briefs supporting petitioner's position that the assumed validity of the December 13th order has tainted all that has occurred since, and that subsequent actions of the Judicial Council, quite clearly within their powers, are void because they are fruit of the poisonous tree.[4] The details of the argument are never made clear and it is difficult to follow.

The order of February 4, 1966, was within the powers of the Judicial Council under both § 137 and § 332 of the Judicial Code. It accepted the division of future cases agreed to by all the judges of the district court, including Judge Chandler. With regard to past cases, it accepted the view of Judge Chandler rather than that of his colleagues on the district bench. There was a suggestion earlier in this long litigation that "Judge Chandler and the other district judges in his court all acted under duress when they reached an agreement over the division of new cases filed in their court." (Petitioner's Reply to Memorandum for Respondent, and Petitioner's Suggestion That His Petition Has Not Become Moot 4.) Any duress on the other judges

[4] We apologize for the "time-worn metaphor," *Harrison v. United States,* 392, U.S. 219, 222 (1968), but in this context it seems apt

is wholly speculative and outside the record. In any event, it is irrelevant. There was no compulsion on Judge Chandler to agree to that division of the new cases. And even if the December 13th order was a form of duress on January 25, 1966, when the judges of the district court decided on the division of cases, that order had been superseded, and there was no conceivable duress, on September 1, 1967, when all of the judges, including Judge Chandler, in response to an invitation from the Judicial Council to propose a new division, reported that the existing division was "agreeable under the circumstances." (Statement 61.) In his latest brief filed by counsel, petitioner tells us that he went along with the division of new cases on January 25, 1966, as "his best strategy." But litigants are not entitled to play clever games in an effort to force this Court to decide a matter that no longer requires decision. Judge Chandler apparently concedes that if he had disagreed with the other district judges, and insisted on his right to hear new cases, there would have been a disagreement among the district judges and the Judicial Council would have had clear authority to act under 28 U.S.C. § 137. His argument that by agreeing to have no new cases assigned to him he in some fashion prevented the Council from giving him what in all respects he had contended for smacks of Alice in Wonderland.

Though it is of academic interest only, it is hard to see any force in petitioner's point that 28 U.S.C. § 137 extends only to new cases and that the Judicial Council has no authority to act if there is a disagreement among the district judges about cases already assigned. Consider this example. In a two-judge district, each judge is assigned 50 cases. The cases given Judge

A are easy. Many are settled, many result in pleas of guilty, and in a short time he has disposed of all of them. The cases given Judge B, by the random assignment process, are all difficult cases that are likely to lead to protracted litigation. Judge A offers to take some of Judge B's cases but Judge B disagrees. Would it not be entirely reasonable, under those circumstances, for the Judicial Council to say that it is in the public interest to use all its manpower to get the old cases decided, rather than having Judge A hear new cases while the cases on Judge B's docket grow gray with age? There is nothing in the text or the legislative history of the statute that is now § 137 that would bar a judicial council from taking such clearly sensible action.

But even if § 137 were never on the books, the February 4th order of the Judicial Council would be justified by § 332, a statute adopted long after the statute that is now § 137. As originally adopted, what is now § 332 made it "the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." In its present form the statute authorizes the judicial council to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," and requires the district judges promptly to carry into effect these orders. Chief Justice Vinson wrote that:

> The councils are authorized by statute to "take such action thereon as may be necessary." This may take the form of investigation into the causes for delay, recommendations for transfer of judges into congested districts, or directions as to the assignment of cases within the district.

Vinson, *The Business of Judicial Administration,* 35 A.B.A.J. 893, 895 (1949). Chief Justice Burger, while still a circuit judge, said that "any problem — whatever it may be — relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council." *Report* 6.

That the broad powers thus granted the judicial councils include the power to order a district judge not to take on any new cases until he has disposed of his pending cases has been taken for granted by all who have considered 28 U.S.C. § 332 and it is a power that has been exercised on other occasions. Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts,* 47 A.B.A.J. 169, 170 (1961); Shafroth, *Modern Developments in Judicial Administration,* 12 Amer.U.L.Rev. 150, 160 (1963). The report of the special committee of the Judicial Conference lists as among the responsibilities of the councils "having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided." *Report* 10.

Chief Justice Taft observed long ago that "heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any." Taft, *Adequate Machinery for Judicial Business,* 7 A.B.A.J. 453, 454 (1921). Supervision is essential if the courts are to preserve public confidence and esteem. Judicial independence is rightly cherished in this country, but this independence hardly extends to taking a vacation of five months every year, as Judge Lumbard has told us one district judge was doing not so long ago. Lumbard, *supra,* at 172. The matter was well put by Arthur

T. Vanderbilt, testifying in support of the legislation that is now 28 U.S.C. § 332:

> The difficulty is that we have inherited from primitive days, when transportation was slow and difficult, the theory that every judge was a law unto himself. He should be a law unto himself in the decision of cases, but should not be a law unto himself when it comes to matters designed to render service to the community.

Hearings on Administration of United States Courts before a Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess. (1939), p. 18.

The 1939 legislation was intended to provide a measure of supervision to assist the courts in providing maximum service to the community. The orders of the Tenth Circuit Judicial Council on February 4, 1966, and September 14, 1967, are well within the powers granted by that legislation. They pose no threat to the independence of the judiciary.

Conclusion

For the reasons set out above, the motion for leave to file a petition for an extraordinary writ should be denied.

Respectfully submitted,

CHARLES ALAN WRIGHT
Attorney for the Respondent
2500 Red River Street
Austin, Texas 78705

December 1, 1969

87th Congress, 1st Session - - - - - - House Document No. 201

REPORT ON THE POWERS AND RESPONSIBILITIES OF THE JUDICIAL COUNCILS

A REPORT

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WITH A

FOREWORD BY THE CHAIRMAN

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

PRESENTED BY MR. CELLER

JULY 5, 1961—Ordered to be printed

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H. Res. 250

In the House of Representatives, U.S.,
June 29, 1961.

Resolved, That the report entitled "Report on the Powers and Responsibilities of the Judicial Councils", by the Judicial Conference of the United States, March 13, 14, 1961, together with a foreword by Honorable Emanuel Celler, chairman of the Committee on the Judiciary, be printed as a House document.

Attest:

RALPH R. ROBERTS, *Clerk*.

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LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., March 24, 1961.

Hon. SAM RAYBURN,
Speaker of the House of Representatives,
The Capitol, Washington, D.C.

DEAR MR. SPEAKER: Pursuant to the provisions of title 28, United States Code, section 331, I am transmitting herewith a report on the operation of the judicial councils of the circuits, provided for in title 28, United States Code, section 332, adopted by the Judicial Conference of the United States at a meeting held at Washington, D.C., March 13–14, 1961.

Respectfully,

EARL WARREN,
Chief Justice of the United States.

FOREWORD

By Hon. Emanuel Celler, Member of Congress

It is gratifying to receive from the Chief Justice this report of the Judicial Conference of the United States on the powers and responsibilities of judicial councils. It is important and urgent that the judges of the United States rid themselves of any lingering doubts on this subject and that the judicial councils in all circuits discharge their broad administrative functions as contemplated and authorized by the Congress.

The report of the Judicial Conference, which follows, accurately sets forth the legislative history of the laws enacted in 1939 which created the judicial councils of the circuits and the Administrative Office of the U.S. Courts, with all-inclusive responsibility for court management and judicial administration. Since I, at the time, was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice.

The Committee on the Judiciary, of which I am privileged to serve as chairman, has had in the past good reason to question whether the judicial councils have exercised the broad powers Congress conferred upon them by the enactment of section 332 of title 28 of the United States Code and whether the councils were as effective as they might be and were intended to be in maintaining the high standards desirable in judicial administration.

In past years many problems have been called to the attention of the Committee on the Judiciary which, in my judgment, should have been settled by the judicial council of the circuit and need never have been brought to the attention of the Congress if the judicial council had met the responsibility and exercised the powers conferred upon it by the Congress. I will mention only one example.

The Congress is not infrequently importuned to create additional judicial districts and divisions. Most of these demands originate from inadequate judicial service in the localities concerned. Nearly all of them could and should be remedied by action of the judicial council of the circuit in arranging and planning judicial assignments to provide an equitable distribution of the judgepower of the circuit.

The language of title 28, United States Code, section 332 was recommended to the Congress in 1939 by the judges themselves and was deliberately worded in broad terms in order to confer broad responsibility and authority on the judicial councils. It was the considered judgment of the Congress that the judicial councils were by their very nature the proper agents for supervising management and administration of the Federal courts. The councils are close

to all the courts of the circuit and know their needs better than anyone else and, by placing responsibility and authority in the councils of the circuits, administrative power in the judicial branch was decentralized, as it ought to be, and in each circuit kept in the hands of judges of the circuit.

There is an urgent need for the judicial councils in all circuits to recognize their full responsibilities and to perform more effectively the function originally intended by the Congress. This report by the Judicial Conference of the United States concludes that the present statute is adequate. There is, therefore, every reason to expect that in the future the judiciary will undertake to do their own housekeeping and not leave these responsibilities to the Congress or to some other agency to be authorized by the Congress.

I am convinced that if the recommendations in this report of the Judicial Conference are fully implemented and carried out by the judicial councils of the circuits there will result a wholesome and general improvement in the administration of the Federal judicial system, which is as much desired by the Congress as by the judiciary.

EMANUEL CELLER,
Chairman, Committee on the Judiciary.

REPORT ON THE RESPONSIBILITIES AND POWERS OF THE JUDICIAL COUNCILS

Adopted by the Judicial Conference of the United States at its spring session held March 13–14, 1961

Introduction

The Judicial Conference of the United States, at its September 1960 session, directed that a study and report be made on the responsibilities and powers of the judicial councils of the circuits, under title 28, United States Code, section 332, in the light of the background, history, expressions, experience, and other data existing as to the statute.

A special committee was appointed for this purpose—consisting of Chief Judge Harvey M. Johnsen of the Eighth Circuit, chairman; Chief Judge J. Edward Lumbard of the Second Circuit; Circuit Judge Richard T. Rives of the Fifth Circuit; Chief Judge Royce H. Savage of the northern district of Oklahoma; and Chief Judge Roszel C. Thomsen of the district of Maryland—and a report of its studies and conclusions was duly filed.

The Judicial Conference, after a thorough consideration of the report, which resulted in certain appropriate modifications, adopted the report at its session on March 13–14, 1961, and directed that it be published.

I. Background of the Statute

Section 332 presently appears as part of chapter 15 in the Judicial Code, which is entitled "Conferences and Councils of Judges." This convenient grouping into a separate chapter of the various provisions existing in the code for judicial conferences and councils, together with the simplification and change engaged in as to some of the original language, which was done by the revision and codification act of 1948, possibly has tended to dim a little the setting and the context in which the provision for judicial councils was initially enacted.

The provision for judicial councils of the circuits came into being as a section of Public Law No. 299, approved August 7, 1939 (53 Stat. 1223), whose enacting clause read:

> That the Judicial Code is hereby amended by adding at the end there of a new chapter to be numbered XV and entitled "The Administration of the United States Courts," as follows:

Sections 302 to 305 of this new "Chapter XV—The Administration of the United States Courts" contained the provisions for the establishment, structure, and functions of the present Administrative Office

of the U.S. Courts. Section 306 followed, coordinately and relatively, with provision for another instrumentality in the statutory scheme of "The Administration of the United States Courts."

The provisions of section 306, as here pertinent, were:

> To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit [now designated as chief judge] to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit who are hereby designated as a council for that purpose * * *. The senior judge shall submit to the council the quarterly reports of the Director [of the Administrative Office] required to be filed by the provisions of section 304, clause (2), and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. * * *

In the revision and codification made of the Judicial Code in 1948, this language was shortened; a sentence was added that "The council shall be known as the Judicial Council of the circuit"; the word "directions" was changed to "orders"; and the expression "To the end that the work of the district courts shall be effectively and expeditiously transacted," etc., was rephrased and constituted into a separate paragraph, which is the final paragraph in present title 28, United States Code, section 332, and which reads:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit. The district judges shall promptly carry into effect all orders of the judicial council.

The change of the word "directions" to "orders" would seem to have been one of form and emphasis rather than of substance, in view of the edict contained in the original statute that "It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." Thus, there has occurred no change of substance in the statute since its original enactment, except that, by the substitution made of the expression "the effective and expeditious administration of the business *of the courts within the circuit*" (emphasis supplied), for the previous phrases of "the work of the district courts" and "the administration of the business" of these "respective courts," it can perhaps be argued that the provisions of the section now are as specifically applicable to a court of appeals, under the general term "the courts within its circuit," as to a district court.

The point here, however, is that the background, history, and expression from which the original statute emerged are as significant in relation to the present statute as in their lighting of the purpose and scope of the initial enactment.

The relationship existing under Public Law No. 299 between the creation of the Administrative Office of the U.S. Courts and the establishment of judicial councils of the circuits, as instrumentalities in "The Administration of the United States Courts," has been referred to above. In examining the purpose which the judicial councils thus were designed to serve, it is of fundamental interest to note why and how the provision for them came to be made a part of the statute.

At the time of the September 1938 session of the Judicial Conference, there had been pending in the Congress a measure, known as the Ashurst bill, sponsored by the Attorney General, and having

as its objectives (in the characterization made by the Judicial Conference report) (1) "to give the courts the power of managing their own business affairs [budget, supplies, etc.] and to that extent relieve the Department of Justice of that responsibility," and (2) "to secure an improved supervision of the work of the courts through an organization under judicial control." [1]

Some of the judges throughout the system were in disagreement or doubt as to the desirability of lodging in such an administrative organ the powers provided for in the bill, even though the office was to perform its functions under the control of the judiciary itself. Members of the Supreme Court also were opposed to the measure as it stood, because of their view that the responsibility for the functioning of the Administrative Office and the proper exercising of the powers set up in the bill would fall on that Court and could cast upon the Chief Justice the necessity and burden of becoming involved at local levels in the complaints, problems, and questions which might arise—thus "possibly making the Chief Justice and the Court itself a center of attack."

In the September 1938 conference, Chief Justice Hughes took occasion to discuss these difficulties in relation to the scope and purpose of the bill, which he characterized as extending to—

> the discovery of the needs of the courts, not merely from an administrative point of view in its more restricted sense, but discovery of unnecessary delays, of inefficiency and *of all the various matters relating to the work of the judges which may be regarded as important to a more ideal administration of justice in the Federal courts.* [Emphasis supplied.]

He then made the following proposal to the Conference:

> Now, my thought has led me to this consideration: I think the difficulty in this present bill lies in an undue centralization * * *. My thought is that there should be a greater attention to local authority and local responsibility. It seems to me that * * * we have in the various circuits foci of Federal action from the judicial standpoint for supervision of the work of the Federal courts.
>
> Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various circuits—immediate responsibility for the work of the courts in the circuits, with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit.
>
> Now we have had in the States considerable effort in this direction through the appointment of judicial councils. * * * My thought is that in each circuit there should be an organization *which will have direct and immediate responsibility with regard to the judicial work in that circuit.* [Emphasis supplied.]
>
> My suggestion for your consideration is that there should be in each circuit a judicial council. * * *
>
> * * * * * * *
>
> When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities. And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the more remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice.[2]

[1] Report of the Judicial Conference, September session, 1938, p. 12.

[2] These quotations, and those which have preceded them, have been extracted from Transcript of the Proceedings of the Judicial Conference, Sept. 30, 1938, pp. 174-192.

The Judicial Conference approved this suggestion of Chief Justice Hughes and made provision for a committee to prepare a legislative measure—

having in view the incorporation of the provisions of the present bill looking to the transfer of the budget from the Department of Justice to the administration of the courts by some proper means, and likewise embracing a provision looking toward the establishment of judicial councils or some other like method within the several circuits and the District of Columbia *for the control and improvement of the administration of justice therein.*[3] [Emphasis supplied.]

The committee thus created collaborated with a committee appointed by the Attorney General in the preparation of a bill, which was introduced in the Senate as S. 188, 76th Congress, 1st session, and which, with some minor changes, became Public Law No. 299. It should be noted here, however, that the provisions of the section on judicial councils represented the concept and the product of the members of the Committee of the Conference, under the directions given them as set out above, and that no change whatsoever was made by Congress in the provisions or in the language which the Committee proposed. Congress enacted the section dealing with judicial councils precisely as the committee had formulated it. It thus gave to the judiciary, in exact form and content, what the Committee of the Conference, under the responsibility imposed upon it by the Conference, was convinced, and held out to the committees of the Congress, embodied the responsibility and had the capacity to function as an effective instrumentality in the correlated scheme being enacted, for "The Administration of the United States Courts."

II. Legislative History of the Statute

In seeking to gain the acceptance of Congress for the provision for judicial councils, as well as for the provisions of the bill generally, various members of the Committee of the Conference testified before the congressional committees.

Chief Justice Groner of the Court of Appeals for the District of Columbia, who was Chairman of the Conference Committee, spoke of the considerations engaged in at the September 1938 session of the Conference, which had prompted the appointment of the Committee and which had entered into the Committee's drafting result, as follows:

There was a general recognition of the fact that, altogether aside from the question of the administration of the funds of the courts, there was a feeling on the part of the judges and a large part of the members of the bar that there ought to be some method of compiling the statistics of the work of the courts, and of keeping abreast of the work by bringing those statistical figures to the attention of some organization of the courts which could apply corrective measures when they were necessary.

* * * * * * *

The additions in the bill over the former bill are in a provision which creates in each circuit what is called a judicial council, composed of all the circuit judges in the circuit. The provisions in relation to the duties of the judicial council, condensed, are that the administrative officer shall examine the state of the dockets, shall ascertain the cause of apparent delays in the disposition of cases, the time which the judges give to the trial of cases, and the whole subject of the work of the district courts, and once in each quarter he is required to put that information together, with his comments in the form of a report, which he submits to the newly instituted judicial council.

* * * * * * *

[3] Report of the Judicial Conference, September session, 1938, p. 12.

The bill provides that it shall then be the duty of the judicial council in each circuit to consider the report of the administrative officer, and promptly to take such action as may be necessary to correct whatever is made the subject of criticism therein. * * *

So far as I know personally, the criticism of the courts is due to delay. I have not heard, except perhaps in one or two instances, any substantial criticism of the work of the courts, except that the length of time which ensues between the commencement of a suit and its conclusion is too long, particularly the delay which exists in one or two or three or four districts in the country.

Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial setup we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, *or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.*

The bill also provides what is not now true, that it shall be the duty of the district judge, when admonished or when matters are otherwise brought *to his attention by the judicial council, to take whatever steps are thought to be necessary or declared to be necessary to correct those things which ought not to exist in a well-run judicial system.*[4] [Emphasis supplied.]

This part of the testimony of Judge Groner was formally incorporated into Senate Report No. 426, which was made to accompany S. 188, in Congress consideration of the bill. Judge Groner added a comment, in concluding his testimony, to the effect that representatives of the Administrative Office should be able to be of assistance informationally to the judicial councils in "finding out, in regard to delays or any other matters of comment or criticism, the cause of it * * *."[5] He made reference also at the end of his testimony, as he had done at the start, to the duty and responsibility of the courts, in preserving the independence of the judiciary, "of protecting themselves against the criticism or against those things which produce criticism" and "of maintaining the general and universal confidence of the people in the courts,"[6] and indicated his belief that the provisions of the bill would help to serve that end.

There was testimony of similar effect by other members of the Conference Committee, as well as by other judges and lawyers. The late Judge John J. Parker, a member of the Conference Committee, stated, in his testimony at the hearings before the Committee of the Judiciary of the House of Representatives, 76th Congress, 1st session, page 22:

Judge PARKER. This (council) can deal with all sorts of questions that arise in the administration of justice.

Mr. CELLER. Do you put any restraint on the council at all?

Judge PARKER. I do not think this bill does. Of course, I assume this is true: That the councils will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.

It is unnecessary here to go further into the testimony before the congressional committees. The general purport of all this may concludingly be summarized in the expression made by the late Arthur T. Vanderbilt, a member of the Attorney General's Committee which collaborated with the Committee of the Conference, the then president of the American Judicature Society, and a former president of the American Bar Association:[7]

[4] Hearing before the Subcommittee of the Committee on the Judiciary of the Senate, Apr. 4 and 5, 1939 on S. 188, pp. 9, 10, 11.
[5] Id., p. 14.
[6] Id., pp. 14 and 9.
[7] Id., p. 16.

I would like to point out that the present bill has a great advantage over the bill that was introduced last year, and for that I think the credit must go to the Chief Justice and the other members of the Supreme Court, in that it does not attempt to centralize all the business affairs of the Federal courts in Washington, but rather creates a system of decentralization in recognizing the circuit courts of appeals, 11 of them, * * * *as the operating units in bringing about the proper administration of justice.* This bill has at least that very great advantage that, the circuit judges being responsible for the condition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. I think the principle or the example there set is one which is very important and will be very helpful in the administration of the bill. [Emphasis supplied.]

It seems patent that what the Committee of the Conference intended, what its members and the other witnesses who testified held out to the committees of the Congress, and what the report which accompanied the bill reflected as being the legislative understanding and object of the provision, was that it imposed upon a judicial council the responsibility of seeing that the work and function of the courts in its circuit were expeditiously and effectively performed; and that this responsibility of observation, supervision, and correction went to the whole of a court's functioning, in both personal and institutional aspect.

In the language set out in Senate Report No. 426, page 4, extracted from one of the witnesses' testimony, the concept was—

that whatever is wrong in the administration of justice, from whatever source it may arise, is brought to the attention of the judicial council, that it may be corrected by the courts themselves.

III. Literature on the Statute

The section on judicial councils does not appear to have been the subject of much outside expression, indicative of general legal view upon it.

At the 1958 Attorney General's Conference on Court Congestion and Delay in Litigation, however, Circuit Judge Warren E. Burger commented as follows (Report of the Conference, pp. 9–10):

These [last] two sentences of section 332 * * * are in general terms, but they are all-embracing and confer almost unlimited power. Any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council.

Similarly, in an address before the National Conference of Judicial Councils in 1960 (reported in vol. 47, A.B.A. Journal, p. 169) Chief Judge J. Edward Lumbard, a member of this Special Committee, stated:

As this language [of sec. 332] is about as broad as it could possibly be, there is no doubt that the Congress meant to give to the councils the power to do whatever might be necessary more efficiently to manage the courts and administer justice.

Further, in an article appearing in the June 1960 American Bar Association Journal, Circuit Judge Prettyman made this characterization of the statute and its implications:

This statute is flat and unequivocal in conferring power. With the power goes corresponding responsibility. With responsibility goes corresponding duty.

The statute has also been referred to in the Report to the Senate Appropriations Committee, of April 1959, of the Field Study of the

Operations of United States Courts, made by staff member Paul J. Cotter, where, among other things, the observations were made (pp. 33 and 36):

> The objectives of this legislation, which was passed in 1939, appear quite clear. * * *
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> * * * It was the judiciary, for the most part, which urged Congress to enact the present law relating to the supervisory functions of judicial councils. It has been on the statute books for approximately 20 years without any requests for changes being made, and it would appear incumbent upon the judiciary to make it work or to request amendment to the present law.

IV. Recognition of the Scope of the Statute Made in its Application and Use

The purpose of this report is to indicate the responsibilities and powers of the judicial councils as they exist under the present statute. It is not, therefore, necessary to go into the question of the number of times that the statute has affirmatively been used by the several councils. The special Committee of the Conference, appointed to make this study, has been able to obtain from each chief judge of the circuits individual examples of situations in which the statute has been employed, in order to examine the scope of the responsibility and power which has thereby been given recognition in its application.

These examples show a variety of situations in which the councils, mostly through having the chief judge deal with the matter in personal approach, have undertaken and effected corrections of things which lie within the full scope of the responsibility pointed out above.

In other words, most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts.

It might be observed, also, that while the various councils have perhaps not been as active generally as they might and should have been, the various actions they have taken indicate that at least some of them have been far more active and alert as to their responsibility than they have been given credit for being by the profession. This lack of cognizance of what they have done probably results from the informal manner in which their responsibility has been exercised—and ordinarily properly so—to accomplish their object.

V. Other Statutes Indicative of the Intended Importance of Judicial Councils

The role of the judicial councils as an instrument of intended importance in the administration of the Federal court system is given emphasis, it is believed, by the recognition and function accorded them under a number of special statutes. It would needlessly prolong this report to enumerate and discuss all of these, but one example will

sufficiently serve in illustration. Thus, under title 11, United States Code, section 62(b), in the field of bankruptcy, the Council is given the power to make removal of a referee for cause, where the judges of a district court fail so to remove him by a concurrence of a majority of them.

VI. Enforcement Powers of the Judicial Councils

Section 332 provides that the Council "shall take such action (on the quarterly reports of the Administrator) as may be necessary"; that it "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit"; and that "The district judges shall promptly carry into effect all orders of the judicial council."

It will be noted that there is no express provision for sanctions in relation to the orders of the council. It is apparent from the testimony of the witnesses before the committees of Congress that this was deliberate on the part of the conference committee in drafting the section; that it was felt that the command of the statute, that all orders of the Judicial Council should be carried into effect, would be sufficient, in the nature and spirit of the judicial office, and in the tradition of the scheme of authority which has always existed in a judicial system, to cause those orders to be obeyed; and that any defiance of a council's order would be extremely rare; and that there would exist implicitly or inherently some way of dealing with it, if it occurred.

Thus, in the Senate committee hearings, Senator (now Circuit Judge) Danaher, in referring to the question of "lack of teeth," commented on the provision relating to the reports of the Director, that the Council may take such action as may appear to be necessary, and indicated that he felt that "that answered the question as to the teeth" (pp. 18 and 19). Arthur Vanderbilt replied, "I think it does quite completely and adequately." He added that, as to situations in which the admonition of the Council might not be respected, "Those cases are so rare that I do not think you would ever have to bother with them." And he had precedingly observed, "I think the circuit court and the judicial council would have adequate power to deal with such a situation" (p. 19).

The significance of this, in the view of the Judicial Conference, is merely to make it clear that the omission of any provision for specific sanctions was in no way intended to affect the Council's responsibility to exercise its supervisory and corrective functions or to prompt it to engage in any deterrence in respect thereto.

VII. Conclusions

On the basis of the foregoing, the Judicial Conference of the United States is of the following views and conclusions:

(1) Under section 332, the judicial councils are intended to have, and have, the responsibility of attempting to see that the business of each of the courts within the circuit is effectively and expeditiously administered.

(2) The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its tech-

nical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

(3) The councils have the responsibility and owe the duty of taking such action as may be necessary, including the issuance of "all necessary orders," to attempt to accomplish these ends.

(4) These responsibilities should ordinarily be approached, in the spirit and tradition of the judicial institution, in an attitude of attempted cooperation and assistance to the district courts and not of purported policemanship, since the purpose of the statute is to make the Council an instrument to help prevent problems from arising, to help find solutions for those which have arisen, as well as to take such corrective action for prevention or solution "as may be necessary."

(5) If the councils are effectively to serve these purposes, it is manifest that they must undertake to keep themselves informed. Their primary source of information will, of course, be the reports of the Director of the Administrative Office, as referred to in the statute. But formal statistics alone will not always, and perhaps not usually, be sufficient as a basis for the exercise of intelligent responsibility. Statistics may point out the existence of a problem, but they do not ordinarily demonstrate the causes or reasons underlying the problem. Thus, in the attempt to deal with a problem, such as where a court appears to be falling behind and perhaps to be approaching an incipient congestion, it would seem desirable for the Council to call upon the Administrative Office to undertake to make an exploration into the particular situation, in order to enable it to get at the underlying picture and understand what it is that needs suggestion or corrective action on the part of the Council.

(6) In the judgment of the Judicial Conference the present statute is adequate to enable the judicial councils, on proper exercise of their responsibilities, to serve their intended purpose, as an instrumentality in the statutory scheme of Public Law No. 299, for "The Administration of the U.S. Courts," to assist in achieving "the effective and expeditious administration of the business of the courts." The expression which the Conference made in the report of its September 1939 session, page 11, after the enactment of the act, is entitled to be renewed:

> It is confidently expected that through the operation of this act the important objectives to which reference has been made will be measurably attained.

VIII. Suggestions and Comments

The Judicial Conference makes these suggestions and comments:

(1) The tasks of a judicial council might perhaps be made easier by gaining understanding and cooperation, through a discussion of its responsibilities and concerns, and its approach to them, at the judicial conference of the circuit. In this connection it should be noted that the purpose of these conferences, under title 28, United States Code, section 333, is—

> considering the business of the courts and advising means of improving the administration of justice within such circuit.

(2) Understanding of the functions and concerns of both the judicial councils and the judicial conferences of the circuits by the bar should be encouraged.

(3) Some formality in the holding of council meetings and the setting up of an agenda can perhaps contribute to their functioning. Too much informality may tend to a dilution of the sense of responsibility.

(4) Understanding of the work of the council and of the spirit of its approach to its responsibilities can perhaps be fostered by inviting the district judge, who is the representative on the Judicial Conference of the United States, to attend a council meeting. In this respect, the same purpose in comprehension will perhaps be served as to the council, as results to a court of appeals in calling a district judge at some time to sit with it and thereby become familiar with its processes.

(5) It is not possible to cover within the compass of this report all of the specific things which the Conference has discussed as falling within the responsibilities of the councils. These have included such matters as the responsibility of dealing with situations where a judge, eligible to retire, has become incapacitated, so that the work of the court is materially being prejudiced thereby. Another illustration is having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided. These specific matters could be numerously multiplied. For purposes of the present report, the all-inclusive general statements made above will have to suffice.

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